

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Use of Portions of Returned 2 GHz	)	IB Docket No. 05-220
Mobile Satellite Service Frequencies	)	

**REPLY COMMENTS OF TMI AND TERRESTAR**

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## SUMMARY

TMI/TerreStar strongly support the Commission's announced intention to redistribute approximately 5 MHz of surrendered 2 GHz MSS spectrum (2.67 MHz in each direction) to TMI/TerreStar and ICO. The proposed redistribution -- which is a necessary first step in ensuring sufficient bandwidth for effective MSS service -- will advance the Commission's strategic goals and other objectives and is in keeping with well-established policies favoring redistribution of recaptured MSS spectrum to incumbent licensees. None of the opponents of the Commission's planned spectrum redistribution has provided any basis for departing from these policies. There also is no basis for delaying spectrum redistribution pending action on Globalstar's petition for reconsideration of the order affirming revocation of Globalstar's 2 GHz MSS license.

*Advancing the Commission's strategic goals.* The Commission's draft Strategic Plan identifies five goals, four of which are relevant here -- broadband, competition, spectrum, and public safety/homeland security -- as the high priority objectives of communications policy in the future. The proposed redistribution of the surrendered spectrum here would serve all four of these critical goals.

- **Broadband.** If TMI/TerreStar have access to adequate amounts of spectrum, they can use their hybrid satellite/terrestrial network to further the Commission's objective that all Americans have affordable access to robust and reliable broadband products and services. By operating the largest and most sophisticated commercial MSS satellite ever, TMI/TerreStar will enable people to have access to high-speed mobile data applications on consumer electronic equipment in all areas of the country, no matter how remote.
- **Competition.** If not spectrum constrained, TMI/TerreStar can compete vigorously with numerous existing mobile services, including at least three other national satellite service providers, the Broadband Radio Service, and four or five nationwide cellular/SMR/PCS providers.

- ***Spectrum.*** One of the Commission's principal spectrum management goals is to expedite the initiation of spectrum-based services to the public. Putting recaptured 2 GHz MSS spectrum in the hands of TMI/TerreStar and ICO is the best way to do so, since TMI/TerreStar and ICO are the only companies that already are licensed, constructing satellites, and meeting milestones.
- ***Public Safety and Homeland Security.*** TMI/TerreStar's hybrid satellite/terrestrial network will enable emergency responders and homeland security end users to have seamless communications using the same low-cost, broadband-capable device in any emergency anywhere in the country. Today's national security concerns dictate that sufficient spectrum must be available to provide emergency responders and homeland security planners with the certainty that, when the need arises, a full-featured and reliable MSS system with adequate spectrum will be available.

***Advancing other Commission objectives.***

*2x20 MHz for 2 GHz MSS.* In its Advanced Wireless Services Order in 2003, the Commission concluded that the public interest would be served by a 2 x 20 MHz MSS allocation in the 2 GHz band. The case for adhering to that determination is even stronger today than it was two years ago, given the advanced technologies, consumer expectations, and demands of homeland security end users that now characterize the mobile telecommunications industry, all of which require adequate bandwidth to provide full benefits to the public.

*Favorable investment environment.* Promptly redistributing the surrendered 2 GHz MSS spectrum to the remaining licensees also will further the Commission's objective of creating an environment that is conducive to investment in new services. TMI/TerreStar and ICO have made heavy financial investments in reliance on the FCC's 2 x 20 MHz allocation for MSS and on its repeatedly stated policy that as spectrum is surrendered, it would be retained for MSS and redistributed to existing licensees down to three licensees and, if supported by an appropriate showing, down to two licensees in the band.

***Furthering policies favoring redistribution of recaptured MSS spectrum.*** The Commission's planned redistribution of the spectrum surrendered by Boeing and Iridium to TMI/TerreStar and ICO is merely the most recent application of longstanding policies favoring the redistribution of recaptured MSS spectrum to the remaining licensees. As far back as 2000, in the 2 GHz MSS Order, the Commission declared that, if any of the MSS licenses was revoked, the returned spectrum could be redistributed among the remaining licensees. Similarly, in 2003, after reallocating a portion of the 2 GHz MSS spectrum to terrestrial wireless services, the Commission reassigned 5 MHz of recaptured spectrum to the remaining 2 GHz MSS licensees and announced that any additional spectrum recaptured as a result of the initial milestone review would be redistributed to the existing licensees – a policy which could have resulted in reassignment of significantly more spectrum than the FCC is considering in this docket. Finally, in the *Satellite Licensing Reform Order*, the Commission established a policy for NGSO-like services (including 2 GHz MSS) under which, if a licensee loses or terminates its license, then the Commission's rules presume that it will reassign the licensee's spectrum among the remaining licensees, so long as three or more licensees remain.

***No basis for a departure from the Commission's spectrum redistribution policy.***

CTIA and T-Mobile have offered no plausible legal or policy reason for the Commission to deviate from its well-established policy for redistributing spectrum. Although CTIA requests that recaptured 2 GHz MSS spectrum be reallocated to terrestrial wireless services, it cannot justify its claim for more spectrum: there is a wealth of evidence showing terrestrial wireless carriers have ample spectrum to meet their needs for the foreseeable future.

CTIA also claims that MSS licensees enjoy a competitive advantage because they did not obtain their spectrum by auction. But it was Congress that decided, in the ORBIT Act,

that spectrum used by satellites providing international service would not be auctioned. There is no basis for transforming Congress's spectrum assignment directive into a presumption that spectrum authorized for satellite use should be auctioned for terrestrial wireless use once it has been surrendered.

CTIA and T-Mobile also criticize TMI/TerreStar for the delays it has encountered in putting its spectrum into use. TMI/TerreStar's schedule, however, is fully compliant with the milestones that the Commission has established for the 2 GHz MSS service, which the Commission has recognized is characterized by long lead times.

***Rejecting Globalstar's request for delay.*** Globalstar claims that, because it has filed a petition for reconsideration of the order affirming revocation of its 2 GHz license, prompt redistribution of surrendered 2 GHz MSS spectrum would unfairly harm its interests. Because the Commission retains discretion under Section 316 of the Act to modify other licenses if a revoked license is subsequently reinstated, however, redistributing surrendered 2 GHz MSS spectrum cannot prejudice Globalstar. Delaying the redistribution of 2 GHz MSS spectrum, on the other hand, would forestall service to the public and would run counter to the many decisions denying requests to delay proceedings involving authorizations and spectrum on the basis of pending litigation.

## TABLE OF CONTENTS

SUMMARY .....	i
TABLE OF CONTENTS.....	v
INTRODUCTION .....	2
I. THE COMMISSION’S BROADBAND, COMPETITION, SPECTRUM, PUBLIC SAFETY AND HOMELAND SECURITY GOALS STRONGLY SUPPORT THE PROPOSED REDISTRIBUTION. ....	4
II. WELL-ESTABLISHED FCC LICENSING POLICIES PROVIDE THAT THE SPECTRUM RELINQUISHED BY THE FIFTH AND FOURTH REMAINING 2 GHZ MSS LICENSEES SHOULD BE REDISTRIBUTED TO THE REMAINING MSS LICENSEES. ....	8
A. The 2 GHz MSS Order .....	8
B. The Advanced Wireless Services Order .....	10
C. The Satellite Licensing Reform Order .....	11
D. Overall Policy .....	13
III. NOTHING CONTAINED IN THE COMMENTS MAKE THE CASE THAT THE COMMISSION SHOULD HERE DEPART FROM ITS WELL-ESTABLISHED POLICIES IN FAVOR OF ITS PLANNED REDISTRIBUTION.....	14
A. CTIA and T-Mobile Fail To Demonstrate Why The Surrendered 2 GHz Spectrum Should Be Given To Terrestrial Carriers Given That Industry’s Large Inventory Of Existing Spectrum And Its Overhang Of Over 175 MHz Of New Spectrum. ....	15
B. CTIA’s Argument That MSS Has Enjoyed A Competitive Advantage Because It Did Not Pay For Its Spectrum Is Baseless And Irrelevant. ....	17
C. There Is No Presumption Against Redistributing Spectrum To Existing MSS Licensees That Are Not Yet Operational.....	19
D. Criticisms By CTIA And T-Mobile Of TMI/TerreStar’s Build-Out Efforts Are Unfounded.....	20
IV. GLOBALSTAR’S CALL FOR DELAY IN THE REDISTRIBUTION OF AVAILABLE MSS SPECTRUM TO EXISTING LICENSEES IS UNNECESSARY AND CONTRARY TO PRECEDENT.....	21
CHART: Current and Proposed Spectrum Holdings (MHz) of TMI/TerreStar vs. Cellular/PCS Providers.....	App. A

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**REPLY COMMENTS OF TMI AND TERRESTAR**

TMI Communications and Company Limited Partnership and its affiliate, TerreStar Networks Inc. (collectively, “TMI/TerreStar”)<sup>1</sup> strongly support the Commission’s announced intention, pursuant to Section 316 of the Communications Act,<sup>2</sup> to redistribute approximately 5 MHz of surrendered 2 GHz Mobile Satellite Service (“MSS”) spectrum (2.67 MHz in each direction) to each of the remaining licensees, TMI/TerreStar and ICO Satellite Service (“ICO”).<sup>3</sup> The Commission’s proposed action carries out the sound spectrum management policies it adopted for the 2 GHz MSS as well as the similarly well-founded redistribution it announced in its satellite licensing reform order. It also ensures that the full complements of service offered by an MSS with an ancillary terrestrial component (“ATC”) may be brought to Americans wherever they live. The proposed action is also supported by the extensive evidentiary record in the 2 GHz MSS, the advanced wireless, the ancillary terrestrial component, and other dockets, and by various submissions of TMI/TerreStar and other parties.

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<sup>1</sup> TerreStar is the prospective assignee of TMI’s 2 GHz MSS authorization and, pursuant to an agreement with TMI, has contracted with Space Systems/Loral Inc. for a satellite that will operate in this band.

<sup>2</sup> 47 U.S.C. § 316.

<sup>3</sup> See *Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies*, Public Notice, FCC 05-133, IB Docket No. 05-220 (rel. June 29, 2005) (“First 2 GHz MSS Public Notice”).

Of critical importance, the agency's proposed action will serve the public interest by fostering a competitive market for mobile satellite services; ensuring that Americans, wherever they live, will have access to affordable broadband service; enabling the provision of reliable, interoperable and redundant communications enhancing homeland security; and providing for an efficient and effective use of the spectrum resource.<sup>4</sup>

## INTRODUCTION

These reply comments are directed towards those parties filing comments opposed to the Commission's announced intention to distribute an additional 2 x 2.67 MHz of surrendered 2 GHz MSS spectrum to each of TMI/TerreStar and ICO.<sup>5</sup> Various other parties filed comments supporting the proposed redistribution.<sup>6</sup>

The First 2 GHz MSS Public Notice presents no issue of whether an additional 2 x 3.34 MHz of surrendered MSS spectrum (following distribution of the 2 x 2.67 MHz announced in IB Docket No 05-220) should be distributed to the existing licensees, as Inmarsat

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<sup>4</sup> The step is plainly reasonable under Section 316 and entitled to substantial deference. The Supreme Court has "repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-03 (1978); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)). This deference has been echoed by the D.C. Circuit. *See, e.g., Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995) (granting "substantial deference" to Commission's public interest determination to grant a waiver).

<sup>5</sup> It is significant to note that none of the mobile service providers that seek to frustrate or delay this intention would ordinarily be permitted to intervene under Section 316 because none of their licenses will be modified by the Commission's proposed action. Nor would any of these parties be subject to additional radio interference as a result of the Commission's proposed action. 47 U.S.C. § 316(a)(2).

<sup>6</sup> *See, e.g.,* Comments of ICO Satellite Services G.P., IB Docket No. 05-220 (July 13, 2005), Comments of Rydbeck Consulting, IB Docket No. 05-220 (July 11, 2005). *See also* Letter from Dale Branlund, Chief Technical Officer, BRN Phoenix Inc., to Marlene H. Dortch, Secretary, FCC, Docket No. 05-220 (July 11, 2005).



has claimed.<sup>7</sup> The Commission's separate Public Notice in IB Docket No. 05-221 seeks comments on the issue that Inmarsat addresses here.<sup>8</sup> TMI/TerreStar will deal with Inmarsat's views in comments in IB Docket No. 05-221.

Similarly, the First 2 GHz MSS Public Notice presents no issue of whether 2 GHz spectrum should continue to be allocated to the mobile satellite service, as CTIA and T-Mobile have argued. CTIA objects to retaining 2 x 20 MHz for MSS, but that issue has already been resolved by the Commission. In its Advanced Wireless Services Order in 2003, the Commission concluded that the public interest would be served by a 2 x 20 MHz MSS allocation in the 2 GHz band.<sup>9</sup> The case for adhering to that determination is stronger today than it was even two years ago, given the advanced technologies, consumer expectations, and the requirements of homeland security that now characterize the mobile telecommunications industry, all of which require adequate bandwidth to provide full benefits to the public.

The process of redistributing surrendered 2 GHz MSS spectrum to remaining licensees that is followed by Commission here is also well-settled, since it is firmly grounded in Commission policy, rule and precedent. From the completion of the 2 GHz MSS docket in 2000 to the present, and particularly including the 2003 satellite licensing reform proceeding, no one should have had any different expectation as to how surrendered 2 GHz MSS spectrum would be distributed. Putting that spectrum in the hands of the present licensees will expedite the initiation

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<sup>7</sup> See Comments of Inmarsat Ventures Limited, IB Docket No. 05-220, at 29 (filed July 13, 2005) ("Inmarsat Comments").

<sup>8</sup> See *Commission Invites Comments Concerning Use of Portions of Returned 2 GHz Mobile Satellite Service Frequencies*, Public Notice, FCC 05-134, IB Docket No. 05-221 (rel. June 29, 2005) ("Second 2 GHz MSS Public Notice").

<sup>9</sup> *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, 18 FCC Rcd. 2223 (2003).

of innovative and advanced services to the public, which is an objective paramount in the Commission's spectrum policy. TMI/TerreStar and ICO are the only companies that already are licensed, constructing satellites, and meeting milestones. TMI/TerreStar alone has raised and committed hundreds of millions of dollars to its system construction and development of technologies that will provide universal mobile voice and broadband services via satellite to consumers, including consumers in underserved areas and to emergency responders.

Both the allocation of a full complement of spectrum to the mobile satellite service and the process for assigning that spectrum must continue to be settled matters. That is what the financial community expects of the Commission and that is the only policy that will permit the existing MSS operators to have any chance of completing their system financing and construction and of providing the service benefits to the public that only MSS can deliver.<sup>10</sup>

**I. THE COMMISSION'S BROADBAND, COMPETITION, SPECTRUM, PUBLIC SAFETY AND HOMELAND SECURITY GOALS STRONGLY SUPPORT THE PROPOSED REDISTRIBUTION.**

The Commission's draft Strategic Plan<sup>11</sup> identifies five goals -- broadband, competition, spectrum, public safety, homeland security, and media -- as the high priority objectives of communications policy in the future. The proposed redistribution of the surrendered spectrum here would serve all four relevant goals.<sup>12</sup>

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<sup>10</sup> The Commission understood the critical need for a settled spectrum allocation and assignment when it stated in its 2 GHz MSS Order, "We adopt these arrangements to provide the certainty of a specific spectrum assignment that many commenters observed is critical to obtaining financing and thus ultimately to market success." *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd. 16,127, 16,138 ¶ 16 (2000).

<sup>11</sup> Public Notice, *Public Invited to Review Draft Strategic Plan* (rel. July 5, 2005) ("Strategic Plan").

<sup>12</sup> The fifth goal, media, is not relevant for purposes of this proceeding.

**Broadband:** The Commission’s draft Strategic Plan states that “[a]ll Americans should have affordable access to robust and reliable broadband products and services,” and regulatory policies should provide sufficient incentive for service providers to offer such services. The TMI/TerreStar hybrid satellite/terrestrial network will advance this Commission goal by ensuring that the American public, wherever they live, will have access to the most advanced data services available at reasonable costs. By operating the largest and most sophisticated commercial MSS satellite ever, TMI/TerreStar will enable people to have access to high-speed mobile data applications on consumer electronic equipment in all areas of the country, no matter how remote. The ability to offer these services on a cost-effective basis is directly related to the ancillary terrestrial component (“ATC”) of its system, which will enable TMI/TerreStar to have the scale and scope to use low-cost handsets that are comparable to those consumers expect from terrestrial-only carriers. Of course, without sufficient spectrum, the system will be capacity constrained and unable to offer a full complement of services to consumers.

**Competition:** Another key goal is to ensure that there is a competitive framework in the United States for the provision of communications service in order to foster innovation and meaningful choice for consumers. TMI/TerreStar’s hybrid terrestrial satellite system will compete vigorously with numerous existing mobile services, including at least three other national satellite service providers, the Broadband Radio Service, Wi-Fi providers, and four or five nationwide cellular/SMR/PCS providers, among others.

**Efficient Spectrum Management:** Another major goal stated in the draft Strategic Plan is the efficient and effective use of the spectrum to promote growth and rapid

deployment of innovative communications technologies and services.<sup>13</sup> As TMI/TerreStar demonstrated in the technical showing it submitted in its April 19 letter to the International Bureau requesting an amendment of TMI's letter of intent, 10 MHz of spectrum would permit TMI/TerreStar to deploy a hybrid satellite/terrestrial system with state-of-the-art 3G and 4G wireless technologies, provide 2 Mbps -- and potentially greater -- wireless packet data rates, and provide a transparent system that offers a user experience that is similar in features, size and cost to today's cellular/PCS services.

Furthermore, the Commission has long sought to expedite the use of spectrum. Reallocating 2 GHz MSS spectrum to terrestrial wireless services would have precisely the opposite effect. Before 2 GHz MSS spectrum could be used for terrestrial purposes, the Commission would need to conduct a reallocation rulemaking; the spectrum would need to be added to the large amounts of unused, unassigned spectrum that is already available to terrestrial wireless carriers (CTIA and T-Mobile) and others; the spectrum would have to be auctioned; the qualifications of the auction winners would have to be examined; service rules would have to be imposed; and systems would have to be constructed. The need to take these steps would delay the initiation of service for many years. It would also jeopardize the initiation of high-speed and other advanced services in remote and rural areas, because those are the areas for which it is most likely that there would be no parties satisfying minimum bid requirements and for which, even if a bidder were to appear, it is unclear that financing could be secured to enable build out. The ubiquitous nature of the TMI/TerreStar hybrid satellite/terrestrial system obviates such concerns.

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<sup>13</sup> Strategic Plan at 4.

**Public Safety and Homeland Security:** One of the most important of the Commission's goals is to ensure that the nation's critical communications infrastructure is universal, reliable, interoperable, redundant, and rapidly restorable. The only communications networks that fulfill this goal completely are hybrid satellite/terrestrial systems, which will permit emergency responders and homeland security end users to have seamless communications using the same low-cost, broadband-capable device in any emergency anywhere in the country.<sup>14</sup>

Limitations on spectrum, however, would diminish the ability of homeland security end-users to access the next-generation mobile satellite systems, and would thereby work counter to the Commission's homeland security goals. Today's national security concerns dictate that sufficient spectrum must be available to provide emergency responders and homeland security planners with the certainty that, when the need arises, a full-featured and reliable hybrid satellite/terrestrial system with adequate spectrum will be available.

TMI/Terrestar is approximately two years from launch and three years from delivering its revolutionary MSS and ATC services. It is this speed-to-service attribute of the Commission's proposal for redistribution of the surrendered spectrum that makes it possible for the remaining MSS licensees not only to achieve the draft Strategic Plan goals summarized above but to do so promptly despite the ardors and expense of launching and bringing into operation state-of-the-art satellite systems.

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<sup>14</sup> Today, advanced security applications with unique network telecommunications needs are being developed. Concurrent development of an MSS platform with adequate spectrum will accelerate design and deployment efforts for these innovative security applications because the network can be designed to accommodate the particular needs of a security application. If an MSS platform with sufficient spectrum were not under development, these security applications would be dramatically limited by the necessity of fitting within the capabilities of existing satellite systems which are already in orbit and have little or no ability to be retrofitted.

**II. WELL-ESTABLISHED FCC LICENSING POLICIES PROVIDE THAT THE SPECTRUM RELINQUISHED BY THE FIFTH AND FOURTH REMAINING 2 GHZ MSS LICENSEES SHOULD BE REDISTRIBUTED TO THE REMAINING MSS LICENSEES.**

The Commission's planned redistribution in this docket reflects a well-developed Commission policy for redistribution of surrendered spectrum that was first announced in 2000 when the 2 GHz MSS service rules were adopted. Yet the primary argument advanced by parties opposing the Commission's planned spectrum redistribution is that the burden is on TMI/TerreStar and ICO to show why the FCC should redistribute any surrendered spectrum under Section 316.<sup>15</sup> These parties, however, have it backwards. The Commission has made clear in multiple proceedings that, up to the point at which only three licensees remain, the MSS spectrum will be redistributed to existing licensees. The First 2 GHz MSS Public Notice, in which the Commission expressed its intention to redistribute the spectrum made available by two of the three surrendering licensees to TMI/TerreStar and ICO, is merely the most recent application of this policy.

**A. The 2 GHz MSS Order**

In 2000 when the FCC adopted service rules for the 2 GHz MSS, the FCC made the determination that the public interest would be best served by authorizing 2 GHz licensees to use more of the spectrum allocated to MSS than their originally assigned share. At that time, it

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<sup>15</sup> For example, CTIA states that "ICO and TMI have a high burden" to justify the proposed spectrum redistribution. Comments of CTIA -- The Wireless Association, IB Docket No. 05-220, at 1 (filed July 13, 2005) ("CTIA Comments"). The comments of Inmarsat state that "neither TMI nor ICO has substantiated the need for more spectrum for MSS service." Inmarsat Comments at 1. *See also* Comments of Sirius Satellite Radio Inc., IB Docket No. 05-220, at 1 (filed July 13, 2005) ("Sirius Comments") (urging against the announced redistribution of spectrum "unless and until the agency determines that no other use of the surrendered spectrum would better serve the public interest"). Like CTIA and certain other commenters, Sirius fails to offer any evidence to rebut the Commission's conclusion that the announced redistribution would serve the public interest.

decided to distribute equally the bulk of the then-available 2 GHz MSS spectrum to the parties that applied for licenses in that band.<sup>16</sup> However, mindful that the 2 x 3.5 MHz of spectrum given to each licensee was based solely on dividing the allocated spectrum among the eight applicants then before it and not on the basis of any needs assessment, the Commission declared that, if one of the MSS licenses was revoked, the returned spectrum could be redistributed amongst the remaining licensees.<sup>17</sup> The Commission explained that the original 2 x 3.5 MHz licensing decision was driven by its desire to avoid mutual exclusivity among applicants and by its wish to expedite the use of this spectrum by providing applicants with enough certainty regarding their spectrum rights to finance their systems.<sup>18</sup> The Commission also authorized the applicants to use as much as 49 MHz of additional spectrum in the 2 GHz band on a secondary basis and to expand their spectrum by aggregating it with other applicants' spectrum.<sup>19</sup> The Commission further mandated that every 2 GHz licensee have the technical ability to operate over at least 70% (i.e., approximately 50 MHz) of the current allocation.<sup>20</sup>

Recognizing MSS providers' claims that they would require more spectrum to operate a successful and full featured system -- a conclusion that is, in light of technological advances and increased consumer expectation, even clearer today -- the Commission declared that it would regularly consider redistributing additional spectrum to licensees both before and

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<sup>16</sup> *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd. 16,127, 16, 138 ¶ 16 (2000) ("2 GHz MSS Order"). A small amount of the then available 70 MHz was held in reserve as "expansion spectrum."

<sup>17</sup> *Id.* at ¶ 18.

<sup>18</sup> *Id.* at ¶ 16 ("We adopt these arrangements to provide the certainty of a specific spectrum assignment that many commenters observed is critical to obtaining financing and thus ultimately to market success.").

<sup>19</sup> *Id.* at ¶¶ 19-22.

<sup>20</sup> *Id.* at ¶ 52.

after their systems became operational.<sup>21</sup> In short, as far back as 2000, the FCC made the determination that the public interest would be best served by redistributing recaptured 2 GHz MSS spectrum to the remaining licensees.

## **B. The Advanced Wireless Services Order**

The Commission reaffirmed these spectrum reassignment decisions in 2003 even as it cut back the 2 GHz MSS spectrum allocation from 70 to 40 MHz. Then, in connection with its simultaneous review of the spectrum required for Advanced Wireless Services (“AWS”), the FCC concluded that “the public interest would be served by redistributing abandoned 2 GHz spectrum recently recaptured as a result of the initial milestone review above the 16 MHz being allocated [for AWS] to the authorized MSS operators that remain when we complete the initial milestone review.”<sup>22</sup>

This standard meant that the FCC was prepared to redistribute significantly more 2 GHz MSS spectrum to the existing licensees in 2003 than it is proposing to redistribute now in the First 2 GHz MSS Public Notice. At the time it adopted the AWS Order, the FCC had completed its milestone review for only three of the then-eight licensees, and, as a result, 21 MHz of spectrum had been surrendered.<sup>23</sup> The Commission reallocated 16 MHz of this

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<sup>21</sup> 2 GHz MSS Order at ¶ 18.

<sup>22</sup> *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, 18 FCC Rcd. 2223, 2239 ¶ 32 (2003) (“AWS Order”).

<sup>23</sup> Notably, although the FCC intended to consider redistribution after each milestone review, only one such review has taken place because the licensees whose spectrum is being assigned in this docket (Boeing and Iridium) surrendered their authorizations before the International Bureau had formally completed a second milestone review. So, too, did Celsat, whose surrendered spectrum is at issue in IB Docket no. 05-221. Accordingly, TMI/TerreStar and ICO are the only remaining licensees after the first milestone review and, based on the Commission’s policy as articulated in the AWS Order, the remaining spectrum should be redistributed to them.



spectrum to terrestrial wireless services, redistributed 5 MHz to the existing 2 GHz MSS licensees, and (as stated above) announced that any additional spectrum recaptured as a result of the initial milestone review would be redistributed to the existing licensees.<sup>24</sup> If even one of the then-five remaining licensees had later been found to have failed to meet the first milestone, therefore, the Commission would have been obligated to redistribute the 5 MHz announced in the AWS Order plus an additional 7 MHz (representing spectrum recaptured from an additional licensee) to the remaining licensees, making for a total redistribution of 12 MHz -- again, more spectrum than the FCC is proposing to redistribute to the remaining licensees in this docket.<sup>25</sup>

The policy that the Commission announced in the AWS Order further supports the Commission's spectrum redistribution proposal in the First 2 GHz MSS Public Notice. If it is in the public interest to redistribute 2 GHz MSS spectrum that is recaptured as a result of an initial milestone review, as the Commission found in the AWS rulemaking, then it also is in the public interest to redistribute 2 GHz MSS spectrum that is recaptured as a result of licensees turning in their spectrum following the initial milestone review.

### **C. The Satellite Licensing Reform Order**

In its *Satellite Licensing Reform Order*, the Commission established a policy for determining whether spectrum recaptured from an "NGSO-like" licensee -- a term which

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<sup>24</sup> AWS Order at 2238 ¶ 32.

<sup>25</sup> In fact, after TMI's authorization was cancelled by the International Bureau (an act that was subsequently reversed by the full Commission), the Bureau modified the authorizations of the then-remaining four licensees to provide each licensee with a *pro rata* 2 x 5 MHz assignment. In other words, the Commission redistributed the (temporarily) recaptured TMI spectrum to the remaining licensees in the band without seeking further comment and pursuant to Section 316 of the Act. (As noted below, when the Commission subsequently reinstated TMI's authorization, it directed the Bureau to modify the other licensees' authorizations accordingly. See Section IV, *infra*.)

includes MSS licensees – would be distributed *pro rata* among the remaining NGSO-like licensees in the same band as the surrendering licensee.<sup>26</sup> It stated that “if a licensee loses or terminates its license, we will probably reassign the spectrum assignment to that licensee equally among the remaining licensees, assuming that there are a sufficient number of licensees remaining to make reasonably efficient use of the frequency band....”<sup>27</sup> The FCC said it would presume that “a sufficient number of licensees for this purpose is three or more.”<sup>28</sup> The spectrum redistribution policy that the FCC adopted is codified in Part 25 of its rules.<sup>29</sup>

The Commission’s announced intention in the First 2 GHz MSS Public Notice to redistribute spectrum from two of the three surrendering 2 GHz MSS licensees fits squarely within the policy the Commission adopted in the Satellite Licensing Reform proceeding. Moreover, the Commission need not determine here whether the spectrum redistribution rule it adopted in the Satellite Licensing Reform proceeding applies to 2 GHz MSS licensees.<sup>30</sup> Even if

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<sup>26</sup> See *Amendment of the Commission’s Space Station Licensing Rules*, IB Docket 02-34, 18 FCC Rcd. 10760, 10788-10790 ¶¶ 61-65 (2003) (“*Licensing Reform Order*”).

<sup>27</sup> *Satellite Licensing Reform Order*, ¶ 61.

<sup>28</sup> *Id.*

<sup>29</sup> See 47 C.F.R. § 25.157(g) (“In the event that an applicant’s license is cancelled for any reason, the Commission *will* redistribute the bandwidth allocated to that applicant equally among the remaining applicants whose licenses were granted concurrently with the cancelled license, unless the Commission determines that such a redistribution would not result in a sufficient number of licenses remaining to make reasonably efficient use of the frequency band.... There is a presumption that three satellite licenses in a frequency band are sufficient to make reasonable use of the frequency band.”) (emphasis added).

<sup>30</sup> In a footnote appearing in its Notice of Proposed Rulemaking in the Satellite Licensing Reform proceeding, the Commission suggested that it would not apply any new spectrum redistribution rule to 2 GHz MSS licensees. See *Space Station Licensing Rules and Policies, Notice of Proposed Rulemaking*, IB Docket Nos. 02-34 & 00-248, 17 FCC Rcd 3847, 3864 ¶ 48 & n.54 (2002) (“*Space Station NPRM*”). The rule that the Commission adopted in the *Satellite Licensing Reform Order*, however, applied without qualification to all NGSO-like licensees, including 2 GHz MSS licensees. See 47 C.F.R. § 25.157(g). And the time has now passed for (continued...)

the rule were not directly applicable, the policy considerations the Commission articulated in the *Satellite Licensing Reform Order* apply with equal force here. For spectrum redistribution purposes, 2 GHz MSS spectrum is indistinguishable from other NGSO-like spectrum.

Accordingly, the Commission's Satellite Licensing Reform spectrum redistribution policy for NGSO-like satellites, like the spectrum redistribution policies the Commission developed in the 2 GHz MSS Order and the AWS Order, require that at least two thirds of the 2 GHz MSS spectrum that was surrendered by Boeing, Iridium, and Celsat should be redistributed *pro rata* to TMI/TerreStar and ICO.

#### **D. Overall Policy**

As the foregoing history shows, there is an extensive, solid, and long-standing foundation for the redistribution proposed by the Commission here. The bald assertion by the opposing commenters that the FCC has “no policy” for how to handle returned 2 GHz MSS spectrum is completely at odds with this history.<sup>31</sup> Opponents of the Commission's proposed redistribution of the surrendered MSS spectrum to the remaining licensees have manifestly failed to demonstrate that the public interest would be served by denying the existing MSS licensees access to this additional spectrum. To the contrary, the benefits of the proposed services, existing precedent, and the record firmly demonstrate that the proposed redistribution of spectrum will serve the public interest.

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parties to challenge the adequacy of the notice provided by the NPRM. *See, e.g., Jem Broadcasting v. FCC*, 22 F.3d 320 (D.C. Cir. 1994).

<sup>31</sup> *See, e.g., Inmarsat Comments* at 12.

**III. NOTHING CONTAINED IN THE COMMENTS MAKE THE CASE THAT THE COMMISSION SHOULD HERE DEPART FROM ITS WELL-ESTABLISHED POLICIES IN FAVOR OF ITS PLANNED REDISTRIBUTION.**

There are strong policy reasons for the Commission's adhering to its current redistribution policies. Hardly anything is more of a disruption and deterrent to entrepreneurial planning and investment than a fluctuating and uncertain regulatory framework. Nothing could be more fundamental to a spectrum-based service such as MSS than the amount of spectrum available to it. No industry is more vulnerable to regulatory volatility than the satellite industry because the lead time to service is so lengthy and because the sunk costs before any revenues are generated are so enormous.

Those considerations are vividly borne out in this situation. TMI/TerreStar and ICO have made heavy financial investments in reliance on the FCC's 2 x 20 MHz allocation for MSS and on its repeatedly stated policy that as spectrum is surrendered, it would be retained for MSS and redistributed to existing licensees down to three licensees and, if supported by an appropriate showing, down to two licensees.<sup>32</sup> TMI/TerreStar and their investors have committed hundreds of millions of dollars, acquired and developed state-of-the-art technology, upgraded their operational plans to provide for more expansive and innovative services and are making significant hardware and other investments so that their satellite will be able to accommodate new technologies and services that may emerge after launch. The redistribution sought in this docket is the first step in realizing the benefits that TMI/TerreStar's hybrid

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<sup>32</sup> CTIA and Inmarsat both acknowledge that TMI/TerreStar and ICO have long maintained that they each needed 2 x 10 MHz for robust MSS service that optimizes its benefits to the public. TMI/TerreStar and other industry players have long predicted a winnowing out of 2 GHz licensees, thereby making possible, in accordance with the FCC's redistribution policy, spectrum assignments that make possible the satellite services that will most effectively meet the public's needs.

satellite/terrestrial system will provide. The proposed redistribution announced in IB Docket No. 05-221 is the necessary second step.

Reinventing the regulatory wheel and changing basic ground rules, after the substantial investment in and work on the development of innovative, efficient satellite systems to provide ubiquitous service to the American public, is, therefore, not only unfair but counter to the important policy of maintaining regulatory stability in order to attract and retain essential investment support. In addition, the benefits to the public made possible by applying the Commission's established redistribution policy to the situation here are powerful and well-documented. In contrast, CTIA and T-Mobile have offered no plausible legal or policy reason for deviating from this established policy of regulatory stability and its essential spectrum redistribution corollary.<sup>33</sup>

**A. CTIA and T-Mobile Fail To Demonstrate Why The Surrendered 2 GHz Spectrum Should Be Given To Terrestrial Carriers Given That Industry's Large Inventory Of Existing Spectrum And Its Overhang Of Over 175 MHz Of New Spectrum.**

CTIA and T-Mobile argue that the surrendered spectrum should be given, not to TMI/TerreStar and ICO and not to another MSS licensee in a future processing round, but to terrestrial wireless carriers. These carriers make little effort to justify the case for more spectrum, however, either because they have incorrectly assumed that it is the MSS industry's

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<sup>33</sup> Inmarsat's comments can quickly be disposed of because it supports retention of the surrendered spectrum for needed MSS services. Where it parts ways with TMI/TerreStar and ICO is that it would make available the surrendered spectrum from the third licensee (Celsat) only in a further processing round in which Inmarsat would seek this spectrum. Its position is, therefore, pertinent only to the issues at stake in IB Docket No. 05-221, and consideration of its arguments should be deferred for that proceeding.

responsibility to show that spectrum allocated for MSS should continue to be allocated for this purpose<sup>34</sup> or because the case for additional terrestrial carrier spectrum is so weak.

Terrestrial wireless carriers have ample spectrum to meet their needs for the foreseeable future. The Commission recently concluded that these wireless carriers “generally have access to the spectrum they need to offer next-generation services now.”<sup>35</sup> The Commission also documented this conclusion in its order approving the AT&T-Cingular merger.<sup>36</sup> It pointed out that the combined AT&T-Cingular entity would have control of as much as 80 MHz of spectrum in certain local markets. Likewise, Alltel, a smaller terrestrial carrier, would have as much as 70 MHz in certain markets as a result of a recently-approved merger.<sup>37</sup>

Moreover, 25 of the 30 MHz of reallocated 2 GHz MSS spectrum,<sup>38</sup> plus over 150 MHz of spectrum from other sources, will be made available to terrestrial wireless providers starting next year.<sup>39</sup> This abundance of new spectrum will roughly double the existing spectrum

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<sup>34</sup> See CTIA Comments at 5-13; Comments of T-Mobile USA, Inc., IB Docket No 05-220, at 7-9 (filed July 13, 2005) (“T-Mobile Comments”).

<sup>35</sup> See, e.g., *Applications of Western Wireless Corp. & Alltel Corp.*, Memorandum Op. & Order, WT Docket No. 05-50, FCC 05-138, at ¶ 73 (July 19, 2005) (“Alltel-Western Wireless Merger Order”); *Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp.*, Memorandum Op. & Order, 19 FCC Rcd. 21,522, 21,577 ¶ 139 (2004) (“AT&T-Cingular Merger Order”).

<sup>36</sup> *AT&T-Cingular Merger Order* at ¶ 138. This spectrum holding is not unusual; the merged AT&T-Cingular entity possesses an average of 57 MHz of spectrum in each of the top 100 markets. See “Current and Proposed Spectrum Holdings of TMI vs. Cellular/PCS Providers” at Appendix A.

<sup>37</sup> *Alltel-Western Wireless Merger Order* at ¶ 73.

<sup>38</sup> *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services*, 18 FCC Rcd. 2223, ¶ 32 (2003). The Commission has already licensed 5 MHz of the previously reallocated MSS spectrum to Nextel. See *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd. 14969 (2004).

<sup>39</sup> Specifically, the FCC has indicated its intent to auction 93 MHz of former federal government spectrum for commercial advanced wireless services (“AWS”) in the 1.4, 1.7 and 2.1 GHz bands. See *FCC to Commence Spectrum Auction that Will Provide American Consumers New Wireless Broadband Services*, News Release (rel. Dec. 29, 2004) (announcing that the FCC (continued...))

holdings of that industry, which is already assigned over 200 MHz nationwide. Despite the substantial amounts of current and future spectrum available for terrestrial mobile service, CTIA and T-Mobile would have the Commission undo the existing allocation of the surrendered MSS spectrum in order to make it available for terrestrial mobile services. CTIA and T-Mobile simply cannot make the case for this alleged need.

**B. CTIA's Argument That MSS Has Enjoyed A Competitive Advantage Because It Did Not Pay For Its Spectrum Is Baseless And Irrelevant.**

CTIA also claims that MSS licensees enjoy a competitive advantage because they did not obtain their spectrum by auction.<sup>40</sup> Congress decided, for compelling reasons, that the satellite services are fundamentally different from terrestrial services and that, therefore, it directed in the ORBIT Act that the FCC “shall not have the authority” to assign by auction “orbital locations or spectrum used for the provision of international or global satellite communications services.”<sup>41</sup> Although the ORBIT Act was amended just this spring, no changes were made to these provisions. As the FCC has recognized, “the ORBIT Act ...

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formally notified the National Telecommunications and Information Administration that it intends to auction AWS licenses in the 1710-1755 MHz and 2110-2155 MHz bands as early as June 2006 and that it will auction spectrum at 1432-1435 MHz in July or August 2006). It also will auction 60 MHz of spectrum in the former UHF band which will be vacated by television broadcast licensees at the conclusion of the digital TV transition; it previously auctioned 24 MHz of former UHF spectrum in from 2000-2003. *See, e.g.,* Upper 700 MHz Band Plan, *available at* <http://wireless.fcc.gov/auctions/data/bandplans/700band.pdf> (last visited July 25, 2005); Lower 700 MHz Band Plan, *available at* <http://wireless.fcc.gov/auctions/data/bandplans/700lower.pdf> (last visited July 25, 2005)

<sup>40</sup> It is unclear how this point is relevant to the issue of the surrendered spectrum.

<sup>41</sup> Open-Market Reorganization for the Betterment of International Telecommunications Act, 47 U.S.C. § 765f (“ORBIT Act”).

prevents the [FCC] from assigning licenses for international or global satellite services by competitive bidding.”<sup>42</sup>

Congress’s sound decision in the ORBIT Act does not equate to a presumption, as CTIA would have it, that spectrum authorized for satellite use should be siphoned off for terrestrial wireless use once it has been surrendered. The redistribution presumption would be particularly indefensible here, where MSS can and will provide services that conventional wireless carriers do not, and often cannot, provide to the public. Because Congress has already determined that satellite spectrum should be handled differently from purely terrestrial spectrum, CTIA’s arguments to the contrary are made in the wrong forum and at the wrong time.

Indeed, if spectrum allocation were left to CTIA, there would be no mobile satellite service at all, and therefore there would be no competition in the mobile communications marketplace from MSS providers, no assurance of mobile service availability for all Americans and none of the homeland security and broadband benefits that MSS will provide. Such a result would nullify the Commission’s goals in allocating the MSS spectrum in the first instance.

Moreover, cellular carriers themselves have received considerable spectrum by procedures other than competitive bidding.<sup>43</sup> It is thus hypocritical for CTIA to claim that any license awarded outside of an auction could not serve the public interest. In addition, although

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<sup>42</sup> See, e.g., *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd. 9614, 9710 ¶ 248 (2002).

<sup>43</sup> See, e.g., *Selection by Lottery for Competing Cellular Applications*, 98 F.C.C.2d 175 (1984) (adopting a lottery procedure for choosing non-wireline cellular carriers outside the top 30 markets).



PCS licenses were awarded for the most part by competitive bidding, many of those PCS licenses are now in the hands of someone other than the original auction winner. In sum, a substantial portion of the spectrum held by wireless carriers was not obtained in an auction.

**C. There Is No Presumption Against Redistributing Spectrum To Existing MSS Licensees That Are Not Yet Operational.**

In opposing the Commission's decision to redistribute surrendered MSS spectrum to existing MSS licensees, CTIA cites FCC statements made in 2000 that "there is a probability that additional spectrum will become available as some authorized systems are not able to implement service," and that "[s]pectrum abandoned by authorized systems may be available for expansion of systems that are operational and require additional spectrum."<sup>44</sup> Apparently, CTIA's argument rests on the word "operational," *i.e.*, surrendered spectrum can be redistributed *only* to MSS systems that are operational, but the Commission's statement providing for redistribution *after* operations did not preclude redistribution *before* operations.<sup>45</sup> Indeed, the Commission understood that some licensees were likely to surrender their authorizations before commencing operation, thereby freeing additional spectrum for use by the remaining licensees. Accordingly, the Commission emphasized that it would consider redistributing spectrum after each MSS milestone date, all but one of which occur before a system is operational.<sup>46</sup>

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<sup>44</sup> CTIA Comments at 4, *quoting* AWS Order, 18 FCC Rcd. at 2238 ¶ 29.

<sup>45</sup> For the same reason, the Commission should disregard Sirius's faulty claim that "it would be premature to assign additional spectrum to ICO and TMI." Sirius Comments at 3.

<sup>46</sup> AWS Order, 18 FCC Rcd. at 2238 at ¶ 29. The Commission has also routinely distributed surrendered MSS spectrum to the remaining licensees prior to meeting the last in-service milestone. *See* Section II(B), *supra*.

**D. Criticisms By CTIA And T-Mobile Of TMI/TerreStar's Build-Out Efforts Are Unfounded.**

The Commission should disregard the unfounded and self-interested criticism by CTIA and T-Mobile of TMI/TerreStar for the delays it has encountered in putting its spectrum into use.<sup>47</sup> Their argument, as is the case for much of their comments, is simply another reflection of the terrestrial wireless industry's fundamental unhappiness with the very existence of the mobile satellite service. In establishing milestones for the mobile satellite service, however, the Commission has recognized that a long lead time is required to design, contract for, construct and put into operation an effective 2 GHz mobile satellite service.<sup>48</sup> Satellite operators may invest a billion dollars before they earn their first dollar of revenue. And they must take the risks associated with putting a complex and expensive satellite into orbit that can be re-engineered and modified to only a limited degree once it has been launched. TMI/TerreStar is making these large investments and it is taking these risks. In complaining that the two remaining licensees do not have an operational record on which to base their case for redistribution, CTIA is simply trying to wish away every mobile satellite service, the public benefits those services will provide (including competition to wireless carriers), and the ORBIT Act itself.

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<sup>47</sup> See CTIA Comments at 6; T-Mobile Comments at 2-3. CTIA also contends that, before they can receive the surrendered spectrum, TMI/TerreStar and ICO must demonstrate that a viable MSS system cannot be deployed with the mere 2 x 4 MHz currently assigned to each licensee in the 2 GHz MSS band. See CTIA Comments at 8. This argument is inconsistent with the policy decisions in favor of redistribution of surrendered MSS spectrum made by the FCC over the course of the past several years (summarized in Section II, *supra*).

<sup>48</sup> TMI/TerreStar's milestone adjustments were due entirely to its authorization being cancelled by the International Bureau – a step that 13 months ago the full Commission rectified and fully redressed by extending TMI/TerreStar's construction milestones commensurately. These adjustments provide no basis for attempts by CTIA and T-Mobile to undermine TMI/TerreStar's commitment to launching a full-featured mobile satellite service within the time period designated by the Commission.

#### **IV. GLOBALSTAR'S CALL FOR DELAY IN THE REDISTRIBUTION OF AVAILABLE MSS SPECTRUM TO EXISTING LICENSEES IS UNNECESSARY AND CONTRARY TO PRECEDENT.**

The Commission should also reject Globalstar's call for indefinite delay of the planned redistribution of the surrendered MSS spectrum. Citing its pending petition for reconsideration of the Commission's unanimous decision to uphold the International Bureau's revocation of its 2 GHz license, Globalstar claims that prompt redistribution of the surrendered spectrum would unfairly harm its interests.<sup>49</sup>

Requests to delay proceedings involving authorizations and spectrum on the basis of pending litigation are routinely denied.<sup>50</sup> Otherwise, litigation could severely stall service to the public. Stays are rarely granted and must be grounded in compelling and rigorous showings of the kind Globalstar has made no effort to submit either here or elsewhere. Rather, the Commission retains discretion under Section 316 of the Act to modify other licenses if another license is subsequently reinstated. Thus, when the Commission reinstated TMI's license, it directed the Bureau to reduce the spectrum assigned to the other four licensees in the band, so that each would have a *pro rata* share of the allocated 2 GHz MSS spectrum.<sup>51</sup> This procedure is

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<sup>49</sup> Comments of Globalstar LLC, IB Docket No. 05-220, at 4-5 (July 13, 2005) (citing Memorandum Opinion and Order, *Emergency Application for Review and Request for Stay of Globalstar L.P.*, 19 FCC Rcd. 11548 (2004) (affirming Memorandum Opinion and Order, *Application for Modification of License for a Mobile-Satellite Service in the 2 GHz Band*, 18 FCC Rcd. 1249 (IB 2003)).

<sup>50</sup> See, e.g., *General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd. 473 (2004); *Application of Wirelessco*, 10 FCC Rcd. 13233 (1995); *Black Crow Wireless LP*, 16 FCC Rcd. 15643 (2001).

<sup>51</sup> *TMI Communications and Company, Limited Partnership and TerreStar Networks Inc., Application for Review and Request for Stay*, 19 FCC Rcd. 12603, 12622, 54 (2004) (providing each of the then-existing five 2 GHz MSS licensees with the right to a selected assignment of 2 x 4 MHz of spectrum). Requests to delay proceedings involving authorizations and spectrum on (continued...)

what protects Globalstar from being prejudiced by the prompt redistribution of surrendered MSS spectrum to the existing licensees. It has been effective protection in the past, and Globalstar has not shown why it would not be effect in these circumstances.

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the basis of pending litigation are routinely denied. *See, e.g., General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd. 473 (2004); *Application of Wirelessco*, 10 FCC Rcd. 13233 (1995); *Black Crow Wireless LP*, 16 FCC Rcd. 15643 (2001).

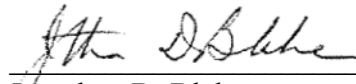
By following its policy of redistributing surrendered 2 GHz MSS spectrum to the remaining licensees in the band, the Commission will ensure new competition in the mobile communications market, support the early introduction of robust and state-of-the-art mobile services, including voice and broadband, to consumers in underserved areas and facilitate new and unique services to first responders and other emergency personnel. The Commission's announced intention to redistribute this spectrum to the existing licensees is a necessary first step in ensuring sufficient bandwidth for the delivery of effective MSS/ATC service to the American public. Given the compelling public interest benefits of services proposed by existing 2 GHz MSS licensees, the necessary second step of assigning to them, on a *pro rata* basis, the full 2 x 20 MHz of spectrum should be authorized in IB Docket No. 02-551.

Respectfully submitted,



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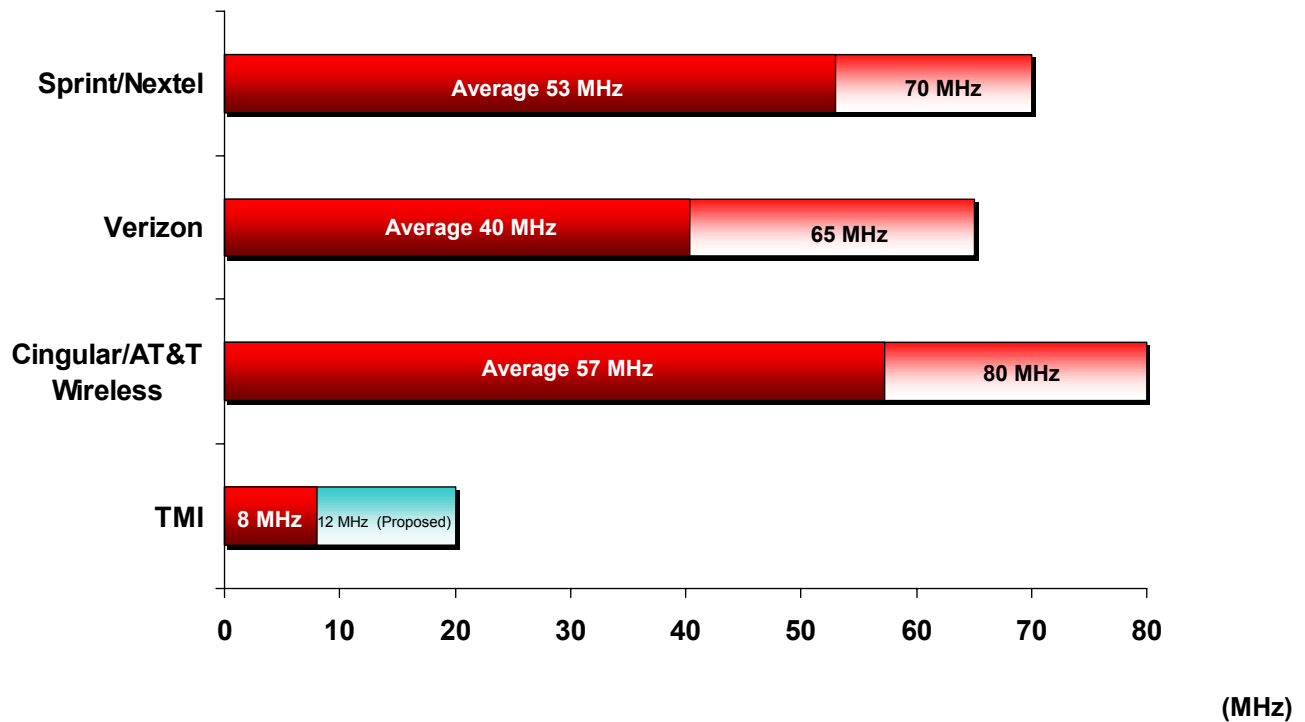
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## APPENDIX A

### **Current and Proposed Spectrum Holdings (MHz) of TMI/TerreStar vs Cellular/PCS Providers**



NOTE: Holdings are based on average (dark shading) and maximum (lighter shading) spectrum in top 100 markets as reported by the FCC, company reports and UBS Warburg ( March 2005).

Prepared by Vinson & Elkins L.L.P.